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NBC Land Sdn Bhd v Majlis Perbandaran Klang

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(NCvC)(W)–441–08 of 2019
LAU BEE LAN, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA
31 MAY 2021

C *Civil Procedure — Limitation — Breach of contract — When cause of action accrued — Whether appellant's claim was time barred — Whether respondent was estopped from relying on the defence of limitation*

D *Tort — Trespass to land — Whether the usage of land was with the knowledge and consent of appellant — Whether appellant failed to prove its claim of trespass — Whether learned judge erred in dismissing appellant's claim for nuisance*

E This was an appeal by the appellant, against the decision of the High Court dated 8 August 2019 dismissing the appellant's claim against the respondent with costs, after a full trial. Golden Hope Plantations Bhd ('Golden Hope') was the owner of a piece of land ('the said land') measuring approximately 161.36 acres in Klang. In 1997, desirous of acquiring a portion of the said land for the purpose of a dumpsite, the state authority issued the relevant statutory notices
F under the Land Acquisition Act 1960 to Golden Hope. In response to the notices, Golden Hope proposed that the state lease the portion of the said land that it required instead of acquiring the whole land. The state authority agreed, and a lease agreement was entered between Golden Hope and the respondent of which Golden Hope leased 36 acres of the said land to the respondent for use
G as a dumpsite. The 36 acres leased to the respondent was located on Lot 77168 and part of Lot 77169 ('the affected land') and the lease was to expire on 22 April 2002. On 30 June 2000, the appellant purchased the said land from Golden Hope. The sale and purchase agreement between them stipulated that the said land was purchased on an 'as is where is basis'. The appellant then
H issued a notice to the respondent to stop dumping rubbish on the affected land. The respondent complied with the request. The appellant and the respondent subsequently discovered that the actual portion of the said land used by the respondent as a dumpsite was 39.479 acres, which was an additional 3.479 acres in excess of the 36 acres leased to the respondent under the lease
I agreement. At the appellant's request, the respondent filled the dumpsite with red soil and took steps to relocate some of the rubbish. At a meeting attended by the parties' respective representatives on 2 December 2003, the respondent had agreed to bear 50% of the cost to rehabilitate the affected land used by the respondent as a dumpsite. The dispute on the rehabilitation of the dumpsite

continued until the appellant instituted an action on 19 June 2017 which was the subject matter of the present appeal. On 9 December 2016, there was a meeting at the respondent's premises attended by the parties' representatives whereby the respondent informed the appellant for the first time that the respondent had changed its mind and that it would no longer abide by the agreement reached between the parties on 2 December 2003. The appellant's alleged causes of actions against the respondent included that: (a) the appellant's cause of action for breach of contract arose from the breach of agreement reached between the appellant and the respondent on 2 December 2003; (b) the appellant's cause of action for trespass arose from the respondent allegedly trespassing into and wrongfully dumping rubbish on the additional 3.479 acres of the appellant's land. The appellant alleged that the actual portion of the appellant's land used by the respondent to dump rubbish situated on Lot 77168 and part of Lot 77169 measured 39.478 acres, whereas the portion of the land leased by Golden Hope to the respondent to be utilised as a dumpsite was only limited to 36 acres; and (c) the appellant's cause of action in private nuisance arose from the respondent's act of trespass and coupled with its refusal to rehabilitate the affected land, had interfered with the condition of the land and consequently caused injury to the appellant's right of enjoyment of its land. The primary grounds of appeal raised by the appellant were: (a) in respect of the appellant's claim for breach of contract, the learned judge erred in finding that the appellant's claim was time barred after having found that the respondent had breached its contractual obligation; (b) in respect of the appellant's claim for trespass, the learned judge erred in finding that the appellant failed to prove the allegation that the rubbish dumped at the site without the appellant's consent after it had become the owner of the affected land; and (c) in respect of the appellant's claim for private nuisance against the respondent, the learned judge erred in making no finding.

Held, allowing the appeal on limitation, and dismissing the appeal in respect of the claim for trespass and nuisance:

(1) The court found that there was merit when the lead counsel for the appellant, Dato' Sri Gopal Sri Ram submitted orally that the cause of action against the respondent arose on 9 June 2016 where it was during a meeting held on the said date between the respondent represented by its new Yang Di Pertua, YBhg. Dato' Haji Mohammad Yasid bin Bidin, Puan Zulina binti Yahya and Puan Haziza binti Mad Salleh that the respondent informed the appellant for the first time that the respondent had changed its mind to the effect that it would no longer abide by the agreement to treat and rehabilitate the affected land. Having regard to the totality of the evidence available, the learned judge erred in failing to judicially appreciate the evidence before her of which the learned justices were satisfied that the respondent by its conduct was estopped from relying on the defence of limitation having regard to the continuous

correspondence between the parties in attempting to resolve the matter. The learned judge had erred in failing to take into account sufficiently the common assumption upon which the parties had proceeded during the relevant period of their relationship (see paras 15 & 18).

(2) The finding by the learned judge that there was a time frame set by the parties to the agreement of 2 December 2003 on when the rehabilitation works were to be carried out could not stand and was clearly erroneous. Undoubtedly, the appellant's cause of action in contract was not caught by limitation and was well within the six years' time bar stipulated under s 6 of the Limitation Act (see para 19).

(3) The court found, based on cl 6 of the sale and purchase agreement dated 30 June 2020 and supported by the evidence of SP1, it was proved that the usage as a dumpsite by the respondent of the land owned by Golden Hope (prior to the sale) was with the knowledge of the appellant and with the consent of Golden Hope. Secondly, the appellants submission that the portion of the said land that was leased to the respondent to be used as a dumpsite was only 36 acres was not contradicted by the appellant, was flawed as there was evidence shown to the contrary. The court found that there was evidence to show that the fact of the area of 36 acres mentioned in cl 6 was an estimate was confirmed by SP1 in cross-examination (see paras 28–30).

(4) Based on the evidence of SP4 and the survey reports of 2002 and 2018 it was correctly submitted by the respondent that the appellant had failed to prove that trespass in the form of usage in excess of 3.479 acres only occurred when the appellant became the owner of the said land. The onus was on the appellant to prove its claim in trespass which the appellant failed to discharge. The learned judge was correct in her finding that the appellant's claim for trespass must fail (see paras 34–35).

(5) The appellant's claim in nuisance hinged on proof of trespass being established. Since the appellant's claim for trespass was not established, the appellant's claim in nuisance must necessarily fall. Nothing turned on the fact that the learned judge made no findings on the cause of action for nuisance as submitted by the respondent (see para 36).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu, terhadapa keputusan Mahkamah Tinggi bertarikh 8 Ogos 2019 yang menolak tuntutan perayu terhadap responden dengan kos, selepas perbicaraan penuh. Golden Hope Plantations Berhad ('Golden Hope') adalah pemilik sebidang tanah ('tanah tersebut') yang berukuran lebih kurang 161.36 ekar di Klang. Pada 1997, dengan hasrat untuk memperoleh sebahagian tanah tersebut untuk tujuan tempat pembuangan sampah, pihak berkuasa negeri telah mengeluarkan pemberitahuan berkanun yang relevan di bawah Akta Pengambilan Tanah 1960 kepada Golden Hope.

Sebagai tindak balas kepada pemberitahuan tersebut, Golden Hope mencadangkan agar pihak berkuasa negeri memajak sebahagian tanah tersebut yang diperlukannya dan bukannya memperoleh seluruh tanah tersebut. Pihak berkuasa negeri bersetuju, dan perjanjian pajakan dimeterai antara Golden Hope dan responden yang mana Golden Hope menyewa 36 ekar tanah tersebut kepada responden untuk digunakan sebagai tempat pembuangan sampah. 36 ekar yang dipajak kepada responden terletak atas Lot 77168 dan sebahagian Lot 77169 ('tanah terjejas') dan pajakan itu luput pada 22 April 2002. Pada 30 Jun 2000, perayu telah membeli tanah tersebut daripada Golden Hope. Perjanjian jual beli antara mereka menyatakan bahawa tanah tersebut telah dibeli berdasarkan 'as is where is basis'. Perayu kemudian telah mengeluarkan notis kepada responden untuk menghentikan pembuangan sampah atas tanah terjejas itu. Responden mematuhi permintaan itu. Perayu dan responden kemudian mendapati bahawa bahagian sebenar tanah tersebut yang digunakan oleh responden sebagai tempat pembuangan sampah adalah 39,479 ekar, yang melebihi 3,479 ekar daripada 36 ekar yang dipajak kepada responden di bawah perjanjian pajakan itu. Atas permintaan perayu, responden telah memenuhi tempat pembuangan sampah itu dengan tanah merah dan mengambil langkah untuk mengalih sebahagian sampah itu. Dalam mesyuarat yang dihadiri oleh wakil pihak masing-masing pada 2 Disember 2003, responden telah bersetuju untuk menanggung 50% daripada kos untuk memulihkan tanah yang terjejas yang digunakan oleh responden sebagai tempat pembuangan sampah. Perselisihan mengenai pemulihan tempat pembuangan sampah berlanjutan sehingga perayu memulakan tindakan pada 19 Jun 2017 yang menjadi hal perkara rayuan ini. Pada 9 Disember 2016, terdapat mesyuarat di premis responden yang dihadiri oleh wakil pihak di mana responden untuk pertama kalinya memaklumkan kepada perayu bahawa responden telah berubah fikiran dan bahawa ia tidak akan lagi mematuhi perjanjian yang dicapai antara kedua-dua pihak pada 2 Disember 2003. Dakwaan kausa tindakan perayu terhadap responden termasuk bahawa: (a) kausa tindakan perayu untuk pelanggaran kontrak daripada pelanggaran perjanjian yang dicapai antara perayu dan responden pada 2 Disember 2003; (b) kausa tindakan perayu untuk pencerobohan timbul daripaa dakwaan responden menceroboh ke dan dengan salah membuang sampah atas tanah tambahan 3,479 ekar perayu. Perayu mendakwa bahawa bahagian sebenar tanah perayu digunakan oleh responden untuk membuang sampah terletak di Lot 77168 dan sebahagian di Lot 77169 berukuran 39,478 ekar, manakala bahagian tanah yang dipajak oleh Golden Hope kepada responden untuk digunakan sebagai tempat pembuangan sampah hanya terhad kepada 36 ekar; dan (c) kausa tindakan perayu dalam kacau ganggu persendirian timbul daripada tindakan responden menceroboh dan bersekali dengan keengganannya memulihkan tanah terjejas itu, telah mengganggu keadaan tanah tersebut dan akhirnya menjejaskan hak perayu menikmati tanahnya. Alasan utama rayuan yang ditimbulkan oleh perayu adalah: (a) berkaitan tuntutan perayu untuk pelanggaran kontrak, hakim yang bijaksana terkhilaf

kerana mendapati bahawa tuntutan perayu telah luput had masa setelah mendapati bahawa responden telah melanggar tanggungjawab kontraktualnya; (b) berkaitan tuntutan peryau utuk pencerobohan, hakim yang bijaksana terkhilad kerana mendapati perayu telah gagal membuktikan dakwaan bahawa sampah yang dibuang di tapak itu tanpa persetujuan perayu selepas ia menjadi pemilik tanah terjejas itu; dan (c) berkaitan tuntutan perayu untuk kacau ganggu persendirian terhadap responden, hakim yang bijaksana terkhilaf kerana tidak membuat apa-apa penemuan.

Diputuskan, membenarkan rayuan berhubung had masa, dan menolak rayuan berkaitan tuntutan untuk pencerobohan dan kacau ganggu:

(1) Mahkamah mendapati bahawa terdapat merit apabila peguam utama untuk perayu, Dato' Sri Gopal Sri Ram berhujah secara lisan bahawa kausa tindakan terhadap responden timbul pada 9 Jun 2016 semasa mesyuarat diadakan pada tarikh tersebut antara responden yang diwakili oleh Yang Di Pertua barunya, iaitu YBhg. Dato' Haji Mohammad Yasid bin Bidin, Puan Zulina binti Yahya and Puan Haziza binti Mad Salleh apabila responden memberitahu perayu untuk kali pertamanya bahawa responden teah berubah fikirannya dan tidak akan mematuhi lagi perjanjian itu untuk memperbaiki dan memulihkan tanah terjejas itu. Setelah mengambil kira keseluruhan keterangan yang sedia ada, hakim yang bijaksana telah terkhilaf kerana gagal secara adil menghargai keterangan di hadapan beliau yang mana hakim yang bijaksana telah berpuas hati bahawa responden melalui tingkah lakunya diestopkan daripada bergantung kepada pembelaan had masa berdasarkan hubungan berterusan antara pihak-pihak dalam usaha untuk menyelesaikan perkara tersebut. Hakim yang bijaksana terkhilaf kerana gagal mempertimbangkan sewajarnya andaian biasa yang mana pihak-pihak telah mendahului sepankang tempoh berkaitan hubungan mereka (lihat perenggan 15 & 18).

(2) Penemuan oleh hakim yang bijaksana bahawa terdapat tempoh masa yang ditetapkan oleh pihak-pihak kepada perjanjian 2 Disember 2003 mengenai bila kerja pemulihan dijalankan tidak boleh bertahan dan jelas tersilap. Tanpa diragui, kausa tindakan perayu dalam kontrak tidak terbatas kepada had masa dan berada dalam had masa enam tahun seperti dinyatakan di bawah s 6 Akta Had Masa 1953 (lihat perenggan 19).

(3) Mahkamah mendapati berdasarkan fasal 6 perjanjian jual beli bertarikh 30 Jun 2020 dan disokong oleh keterangan SP1, ia dibuktikan bahawa penggunaan sebagai tempat pembuangan sampah oleh responden atas tanah tersebut yang dimiliki oleh Golden Hope (sebelum jualan) adalah dalam pengetahuan perayu dan dengan persetujuan Golden Hope. Keduanya, hujah perayu bahawa bahagian tanah tersebut yang dipajak kepada responden yang digunakan sebagai tempat pembuangan sampah

yang hanya 36 ekar itu tidak disangkal oleh perayu, dan cacat kerana terdapat keterangan yang menunjukkan sebaliknya. Mahkamah mendapati bahawa terdapat keterangan untuk menunjukkan bahawa fakta yang kawasan 36 ekar yang disebutkan dalam fasal 6 adalah anggaran yang disahkan oleh SP1 dalam pemeriksaan balas (lihat perenggan 28–30).

(4) Berdasarkan keterangan SP4 dan laporan kajian 2002 dan 2018 ia telah dihujahkan dengan betul oleh responden bahawa perayu telah gagal untuk membuktikan bahawa pencerobohan dalam bentuk penggunaan yang melebihi 3,479 ekar hanya berlaki apabila perayu menjadi pemilik tanah tersebut. Beban adalah terletak pada perayu untuk membuktikan tuntutannya dalam pencerobohan yang mana perayu gagal untuk laksanakan. Hakim yang bijaksana adalah betul dalam penemuannya bahawa tuntutan perayu untuk pencerobohan patut gagal (lihat perenggan 34–35).

(5) Tuntutan kacau ganggu perayu bergantung kepada bukti pencerobohan ditunjukkan. Oleh kerana tuntutan perayu untuk pencerobohan tidak dibuktikan, tuntutan perayu dalam kacau ganggu semestinya gagal. Tiada apa-apa atas fakta yang menunjukkan bahawa hakim yang bijaksana tidak membuat apa-apa penemuan berhubung kausa tindakan untuk kacau ganggu sepertimana dihujahkan oleh responden (lihat perenggan 36).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (folld)
Selvaduray v Chinniah [1939] 1 MLJ 253; [1939] 1 LNS 107, SC (refd)
Slomowitz v Vereeniging Town Council [1966] 3 CPD 317 (refd)

Legislation referred to

Land Acquisition Act 1960
Limitation Act 1953 ss 6, 6(1)(a)
Local Government Act 1976

Appeal from: Civil Suit No BA-21NCVC-40-06 of 2017 (High Court, Shah Alam)

Gopal Sri Ram (Austen Pereira, Harold Tan and Guok Ngek Seong with him) (Harold & Lam Partnership) for the appellant.
S Ramesh (Mohd Faiz with him) (Khairul Fadzli Amin & Co) for the respondent.

Lau Bee Lan JCA:

INTRODUCTION

[1] This is an appeal from the appellant, NBC Land Sdn Bhd (formerly known as Banjaria Sdn Bhd) against the decision of the High Court dated 8 August 2019 dismissing the appellant's claim against the respondent, Majlis Perbandaran Klang ('MPK') with costs, after a full trial.

[2] Having considered the respective parties' written submissions and the oral arguments and the relevant records of appeal, we had allowed the appeal in part on the issue of limitation and dismissed the appeal in respect of the appellant's claim for trespass and nuisance. These are our reasons in respect of the said decision.

BACKGROUND FACTS

[3] The appellant is a property development company in Klang. The respondent, is the Municipal Council of Klang, established pursuant to the Local Government Act 1976 (Act 171).

[4] The facts relevant to this appeal are gleaned from the narrative spelled out by the learned judge in her judgment and the appellant's chronology of facts:

(a) Golden Hope Plantations Bhd ('Golden Hope') was the owner of a piece of land ('the said land') measuring approximately 161.36 acres in Klang. In 1997, desirous of acquiring a portion of the said land for the purpose of a dumpsite, the state authority issued the relevant statutory notices under the Land Acquisition Act 1960 to Golden Hope. In response to the notices, Golden Hope proposed that the state lease the portion of the said land that it required instead of acquiring the whole land;

(b) the state authority agreed and a lease agreement was entered between Golden Hope and the respondent of which Golden Hope leased 36 acres of the said land to the respondent for use as a dumpsite. These 36 acres leased to the respondent is located on Lot 77168 and part of Lot 77169 ('the affected land') and the lease was to expire on 22 April 2002;

(c) on 30 June 2000, the appellant purchased the said land from Golden Hope. The sale and purchase agreement between them stipulated that the said land was purchased on an *as is where is basis*. The appellant then issued a notice to the respondent to stop dumping rubbish on the affected land and on 1 December 2000, the respondent complied with the request;

(d) the appellant and the respondent subsequently discovered that the actual portion of the said land used by the respondent as a dumpsite was 39.479 acres, which is an additional 3.479 acres in excess of the 36 acres leased to the respondent under the lease agreement;

(e) via a letter of 5 January 2002 to the respondent, the appellant acknowledged receipt by YDP Dato' Sharif's office confirming the matters discussed during the meeting on 13 December 2001 which, among others, are as follows:

> Kami difahamkan bahawa pihak Majlis Perbandaran Klang ('MPK') akan menjalankan kerja-kerja rawatan/pemulihan (*rehabilitation*) di atas bekas tapak pelupusan sampah ('tapak tersebut') yang terletak di atas Lot 77168 dan sebahagian Lot 77169 di mana kos-kos untuk kerja tersebut akan ditanggung sepenuhnya oleh pihak MPK ...

(f) at the appellant's request, the respondent filled the dumpsite with red soil and took steps to relocate some of the rubbish. Following the appellant's dissatisfaction with the steps taken, another meeting was held on 2 December 2003 at the respondent's premises. At the meeting attended by the parties' respective representatives, the respondent had agreed to bear 50% of the cost to rehabilitate the affected land used by the respondent as a dumpsite.

This is evident from the minutes of the meeting of 2 December 2003, the relevant extracts are reproduced as follows:

> 2.2 RAWATAN PEMULIHAN DI TAPAK PELUPUSAN MPK DI JALAN TELOK GONG (LAMA)
>
> (g) ...
>
> (h) Tuan Tanah iaitu Syarikat Golden Hope Plantations telah meminta supaya Majlis membaikpulih tanah di tapak pelupusan sampah tersebut.
>
> (i) *Kos bagi rawatan pemulihan bekas tapak pelupusan seluas 40 ekar ini adalah lebih kurang RM6 juta. Syarikat Banjaria Sdn Bhd telah bersetuju untuk berkongsi 50:50 bagi kos tersebut.*
>
> 3.1 KOS RAWATAN PEMULIHAN BEKAS TAPAK PELUPUSAN TELOK GONG
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> Memandang kos bagi rawatan/pemulihan bekas tapak pelupusan sampah seluas 40 ekar adalah lebih kurang RM6 juta, mesyuarat bersetuju supaya pihak *Syarikat Banjaria Sdn Bhd mengeluarkan kos sebanyak RM3 juta. Jumlah ini tidak termasuk kerja-kerja landskap. Pembayaran kepada kontraktor hendaklah dibayar melalui akaun Majlis. Manakala RM2 juta dibiayai oleh kerajaan Persekutuan dan RM1 juta oleh kerajaan negeri (menggunakan peruntukan tahun 2004).*
>
> 3.2 TAWARAN TENDER

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> Kerja-kerja rawatan/pemulihan bekas tapak pelupusan sampah Telok Gong akan ditawarkan secara tender oleh Majlis. (Emphasis added.)

(a) on 18 March 2004, the appellant wrote to the respondent confirming the matters discussed during the meeting on 10 March 2004. Relevant extracts of the letter read as follows:

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> Seperti yang telah diperbincangkan dan dipersetujui di dalam mesyuarat yang diadakan pada 10 Mac 2004 (rujukan B), kedua-dua pihak Banjaria Sdn Bhd dan pihak Majlis Perbandaran Klang ('MPK') bersetuju untuk bersama-sama menanggung kos perbelanjaan bagi rawatan bekas tapak pelupusan sampah di atas Lot 77168 dan sebahagian Lot 77169 dengan nisbah 50:50 ...

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(b) on 15 April 2004 the respondent responded confirming the contents of the appellant's letter of 18 March 2004 regarding the matters discussed during the meeting of 10 March 2004.

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[5] The dispute on the rehabilitation of the dumpsite continued until the appellant instituted this action which is the subject matter of the appeal before us on 19 June 2017. However, prior to this, on 9 December 2016 there was a meeting at the respondent's premises attended by the parties' representatives whereby the respondent informed the appellant for the first time that the respondent had changed its mind and that it would no longer abide by the agreement reached between the parties on 2 December 2003.

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[6] The appellant's alleged causes of actions against the respondent can be summarised as follows:

(a) the appellant's cause of action for breach of contract arose from the breach of agreement reached between the appellant and the respondent on 2 December 2003;

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(b) the appellant's cause of action for trespass arose from the respondent allegedly trespassing into and wrongfully dumping rubbish on the additional 3.479 acres of the appellant's land. The appellant alleged that the actual portion of the appellant's land used by respondent to dump rubbish situated on Lot 77168 and part of Lot 77169 measured 39.478 acres, whereas the portion of the land leased by Golden Hope to the respondent to be utilised as a dumpsite was only limited to 36 acres; and

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(c) the appellant's cause of action in private nuisance arose from the respondent's act of trespass described in para (b) above coupled with its refusal to rehabilitate the affected land, Lot 77168 and part of Lot 77169 had interfered with the condition of the land and consequently caused injury to the appellant's right of enjoyment of its land.

[7] The appellant submitted that the causes of action against the respondent are not time-barred briefly because:

(a) the appellant's cause of action for breach of contract only arose on 9 December 2016 when the respondent informed the appellant for the first time that it had changed its mind and that it would no longer abide by the agreement reached between the parties on 2 December 2003; and

(b) the appellant's causes of action in trespass and private nuisance are continuing for as long as the rubbish dumped on the affected land remains there and is not rehabilitated.

HIGH COURT'S DECISION/GROUNDS OF APPEAL

[8] The primary grounds of appeal raised by the appellant are:

(a) in respect of the appellant's claim for breach of contract, the learned judge erred in finding that the appellant's claim is time barred after having found that the respondent had breached its contractual obligation;

(b) in respect of the appellant's claim for trespass, the learned judge erred in finding that the appellant failed to prove the allegation that the rubbish dumped at the site without the appellant's consent after it had become the owner of the affected land; and

(c) in respect of the appellant's claim for private nuisance against the respondent, the learned judge erred in making no finding.

OUR DECISION

Limitation

[9] It is not disputed that there is in existence a contract between the appellant and the respondent whereby the latter had agreed to carry out the rehabilitation works and pay 50% of the rehabilitation costs. This is evident from the judgment of the learned judge where Her Ladyship held that the appellant had on the evidence proved its case as per the preceding para 9. The reasoning of the learned judge is captured in paras 21–25, the latter of which reads:

> In my view, it is patently clear from the minutes of the meeting of 2 December 2003 and the letters dated 18 March 2004 and 15 April 2004 that the defendant had agreed to pay 50% of the rehabilitation costs and the source of the funds would come from the State and the Federal Government. The defendant by its letter of 15 April 2004 acknowledged and confirmed the plaintiff's letter of 18 March 2004 which stated that the defendant had agreed to pay 50% of the rehabilitation costs.

[10] Thus the only issue with regard to the appellant's claim for breach of contract is the question of when did the breach occur and consequently the question of whether the appellant's claim is time barred.

[11] On the law applicable, the learned judge had cited the *locus classicus* case of *Nasri v Mesah* [1971] 1 MLJ 32, a case common to both parties, and quoted a passage appearing at p 34, right column, paras B to F where the Federal Court held:

> *A 'cause of action' is the entire set of facts that give rise to an enforceable claim*, the phrase comprises every fact which, it traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128). In *Reeves v Butcher* [1891] 2 QB 509; [1891-4] All ER Rep 943, CA, Lindley LJ said:
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> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events: *but it has always been held that the statute runs from the earliest time at which an action could be brought.*
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> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610; [1927] All ER Rep Ext 778, Viscount Dunedin described *'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, cause of action founded on a contract accrues on the date of its breach.* In the case of actions founded on contract, therefore, time runs from the breach (per Field J in *Gibbs v Guild* (1881) 8 QBD 296). (Emphasis added.)

We note that the learned judge correctly stated that *it is clear from the foregoing passage that in calculating the period of limitation, time runs against a plaintiff from the moment the breach of contract occurs.*

[12] Statutorily, the learned judge took cognisance that the aforesaid principle is recognised 'Under s 6(1)(a) of the Limitation Act 1953 [where] an action based on contract or tort must be commenced within six years of the date which the cause of action arose. The period of six years commences from the date of the breach. Therefore in calculating the period of limitation, time runs against a plaintiff from the moment the breach of contract occurs'.

[13] In respect of the issue of limitation, the learned judge held that that there was a time frame for the respondent to commence and complete the rehabilitation works and found that the appellant's claim against the respondent was time-barred as six years have elapsed since the cause of action accrued in 2004–2005. Her Ladyship's reasons for the existence of a time frame set for the rehabilitation works are as stated in paras 34–35 as follows:

> The evidence on this issue is as follows. Not long after the meeting of 2 December 2003, the plaintiff wrote to the defendant on 30 April 2004, expressing its desire to advance the payment for the latter to call for tenders for the rehabilitation works as there might be delay in the State Government releasing the funds. The letter concluded, 'advance payment hendaklah dikembalikan kepada kami sebaik sahaja pihak Kerajaan Negeri meluluskan dan mengeluarkan belanjawan RM3 juta kepada MPK'. *The plaintiff in offering to advance the monies has clearly conducted itself as if it considered that the defendant had an obligation to carry out the rehabilitation works in 2004.*
>
> It is therefore off that the plaintiff is now taking the position that there was no time frame set for the works to be carried out. *It is inconceivable that the plaintiff would have sent the letter of 30 April 2004 if there was no obligation on the defendant to start the works in 2004/2005. It would follow that the defendant was in breach when it failed to do so and time began to run. The plaintiff could have brought this action upon the breach occurring.* (Emphasis added.)

[14] We find that in its written submission, counsel for the respondent supported the aforesaid findings of the learned judge referred in para 13 above in holding that there was a time frame for the reasons proffered by the learned judge. In addition, we find counsel for the respondent proffered a further reason by drawing our attention to a letter from the appellant to the respondent dated 12 October 2010 seeking damages of RM5.4m. Counsel argued that by claiming for damages for rehabilitation works from the respondent in itself is proof that the breach of the agreement had occurred much earlier and not on 9 December 2016 as contended by the appellant when the respondent stated that it would no longer abide by the agreement to rehabilitate the affected land.

[15] With respect we are unable to agree with the respondent's submission. Instead we find there is merit when the lead counsel for the appellant, Dato' Sri Gopal Sri Ram submitted orally that the cause of action against the respondent arose on 9 June 2016 where it was during a meeting held on the said date between the respondent represented by its new Yang Di Pertua, YBhg Dato' Hj Mohammad Yasid bin Bidin, Puan Zulina bt Yahya and Puan Haziza bt Mad Salleh that the respondent informed the appellant for the first time that the respondent had changed its mind to the effect that it would no longer abide by the agreement to treat and rehabilitate the affected land. We find proof of the same in a letter dated 11 January 2017 from the appellant to the respondent stating the following:

> Berdasarkan kepada perbincangan pada hari tersebut, kami berasa amat kecewa kerana selepas beberapa tahun surat-menyurat telah dikeluarkan serta mesyuarat dan perbincangan dengan pihak Majlis Perbandaran Klang (MPK) di mana pihak MPK telah bersetuju untuk bersama-sama menanggung kos perbelanjaan bagi rawatan bekas tapak pelupusan sampah di atas Lot 77168 dan sebahagian Lot 77169 kepunyaan NBC Land Sdn Bhd (dahulunya dikenali sebagai Banjaria Sdn Bhd) dengan nisbah 50:50, *tetapi kini untuk pertama kalinya kami*

A *dimaklumkan oleh Y Bhg. Dato' bahawa MPK telah mengubah pendirian dan tidak akan bertanggungjawab atas isu tapak pelupusan sampah ini dan sebaliknya kami diarahkan untuk merujuk kepada pihak Golden Hope Development Sdn Bhd (tuan tanah terdahulu)*. (Emphasis added.)

B In this regard, we wish to correct ourselves when in our oral decision we did inadvertently pronounced that the breach occurred on 11 January 2007, which in fact is the date of the letter disclosing contemporaneously in all the exchanges of correspondences between the appellant and the respondent that there was an absolute refusal by the latter to perform its obligation to carry out C the rehabilitation works in the manner agreed.

[16] We observed on the following evidence, prior to 9 December 2016, the respondent had not at any time informed the appellant that it would renege on the agreement reached on 2 December 2003:

D

(a) as is evident from the narrative stated in para 4 and the subparagraphs thereunder and para 5 above, the appellant had between 2003 until the end of 2016 continuously corresponded and engaged in further discussion with the respondent to resolve the matter. During this period E of time, the respondent delayed the fulfilment of its promises to treat and rehabilitate the affected land;

(b) even as late as 23 September 2014, by their letter to the appellant, the respondent informed the appellant that it was reviewing the matter and that the appellant would be informed of the decision once made by F them. It is vital that the said letter be reproduced (material parts) as follows:

> RAYUAN PENGELUARAN PERUNTUKAN BAGI MENJALANKAN KERJA-KERJA RAWATAN PEMULIHAN TAPAK DI ATAS LOT 77168 DAN SEBAHAGIAN LOT 77169, MUKIM KLANG, DAERAH G KLANG, SELANGOR DARUL EHSAN, YANG DIMILIKI OLEH NBC LAND SDN. BHD. (DAHULUNYA DIKENALI SEBAGAI BANJARIA SDN BHD)
>
> Dengan hormatnya, saya ingin merujuk kepada perkara di atas.
>
> H 2. Dimaklumkan, Majlis mengambil maklum ke atas rayuan YBhg Dato' berhubung perkara di atas. Majlis perlu menyemak semula dari aspek perundangan dan sebarang keputusan akan dimaklumkan kepada pihak YBhg Dato' kemudian.

I **[17]** In so far as the letter from the appellant to the respondent dated 12 October 2010 seeking damages of RM 5.4m is concerned, in our considered view nothing turned on the same because counsel for the respondent had unequivocally stated that the respondent did not respond to the appellant's letter of 12 October 2010 which ended on the following note: 'Justeru, kami

amat berbesar hati sekiranya kami dapat mengaturkan perjumpaan/perbincangan bagi mencari jalan penyelasaian terhadap perkara tersebut yang sekian lama menemui jalan buntu'. A

[18] Having regard to the totality of the evidence available, we are of the considered view that the learned judge erred in failing to judicially appreciate the evidence before her of which we are satisfied that the respondent by its conduct was estopped from relying on the defence of limitation having regard to the continuous correspondence between the parties in attempting to resolve the matter. Further, we are also of the view that the learned judge had erred in failing to take into account sufficiently the common assumption upon which the parties had proceeded during the relevant period of their relationship as we have alluded to above. An authority in point which is supportive of the appellant's cause of action for breach of contract is the oft-cited case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 345 B to H as follows: B C D

> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by *Lord Russell of Killowen in Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108: E
>
> > Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. F
>
> It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or were a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey v Gopal Chunder Lala (1892) 56 JP 741* and the *American Surety Co v Calgary Milling Co* (1919) 48 DLR 295; [1919] 3 WWR 98 (among others) to which we have referred earlier concerned cases involving representations not of fact but of law. G
>
> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (*Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565) as follows: H
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot I

A do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to*
B *go back on that assumption when it would be unfair or unjust to allow him to do so. If one of the does seek to go back on it, the courts will give the other such remedy as the equity of the case demands*. (Emphasis added.)

C **[19]** In light of the above, it is our judgment that the finding by the learned judge that there was a time frame set by the parties to the agreement of 2 December 2003 on when the rehabilitation works were to be carried out cannot stand and is clearly erroneous. Undoubtedly, for the reasons explained, the appellant's cause of action in contract was not caught by limitation and was well within the six years' time bar stipulated under s 6 of the Limitation Act.
D

[20] At this juncture we pause to state that the appellant did raise the argument that the causes of action in trespass and private nuisance are continuing for as long as the rubbish dumped on the affected land remains
E there and is not rehabilitated. The case of *Slomowitz v Vereeniging Town Council* [1996] 3 CPD 317 *(The South African Reports)* at p 330 paras B to D was cited as follows:

> The statement in Halsbury, 2nd ed, vol 20, para 757: 3rd ed, vol 24, para 347, which has often been cited in our Provincial Courts and received at least the
F inferential approval of this court in *Mc Kenzie v Farmers' Co-operative Meat Industries Ltd*, 1922 AD 16 at p 23, reads:
>
> > Apart from any statutory provision, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the
> G plaintiff to succeed.
>
> Provided he could show damage, plaintiff would no doubt have been entitled to sue immediately the road was closed. But I am unable to agree that, in the events that have happened, such was plaintiff's only cause of action. For, as was said by WATERMEYER, JA, at p 589 of the *Oslo Land case, supra,* and with mention of the
> H earlier decision of this Court in *Symmonds v Rhodesia Railways Ltd*, 1917 AD 582, it is necessary to distinguish between 'a single wrongful act giving rise to one cause of action and a continuing injury causing damage from day to day which may give rise to a series of rights of action arising from moment to moment'.

I **[21]** Lead counsel for the appellant had submitted that the rehabilitation issue is an issue common to the claim in contract and for trespass and private nuisance and it would be sufficient if the appellant succeeded in its claim for cause of action for breach of contract as the result would be the same in that both causes of action were not time-barred. Given this submission and since we

have decided that the appellant's cause of action for breach of contract is not barred by limitation, we do not find it necessary to decide on the line of argument canvassed by the appellant alluded in para 20 above.

Trespass and nuisance

[22] The learned judge decided that the appellant's claim for damages for trespass must fail stating at para 36 of the judgment the following:

> The plaintiff case for trespass in respect of the additional 3.479 acres of land is premised on the assertion that rubbish was dumped at this site without its consent after it had become the owner. There absolutely no evidence to substantiate the allegation apart from the oral assertion of the plaintiff's witness.

[23] The appellant submitted that the learned judge erred in misapprehending the appellant's case for trespass in this manner: it is not the appellant's case that the rubbish was dumped by the respondent on the additional 3.479 acres of land after the appellant purchased the land from Golden Hope and became its owner; rather it was premised on the fact that the respondent had dumped rubbish on the affected land which was 39.478 acres when the portion of the land leased by Golden Hope to the respondent was only limited to 36 acres. According to the appellant, this was the basis of its claim pleaded in para 19 of the statement of claim for trespass by the respondent for dumping rubbish on an additional 3.479 acres of the appellant's land.

[24] In the development of the aforesaid contention, the appellant relied on the examination in chief evidence of Mr Vickneshwaran a/l M Ganapathy, SP4, a qualified land surveyor that the actual portion of the appellant's land used by the respondent to dump rubbish situated on Lot 77168 and part of Lot 77169 identified as 39.478 acres, comprised of 14.280 acres on Lot 77168 and 25.198 acres on Lot 77169. The appellant submitted that the sale and purchase agreement dated 30 June 2020 entered into between the appellant as purchaser and Golden Hope as vendor stated that the portion of the said land that was leased to the respondent to be used as a dump site was only 36 acres which was not contradicted by the appellant.

[25] The appellant further submitted that upon the appellant's request, the respondent took steps in 2002 to relocate the rubbish to an area of 2.050 acres in a survey prepared by SP4. Notwithstanding the relocation, the appellant also submitted that the respondent remained a trespasser as no action was taken to rehabilitate the 3.479 acres of land.

[26] With respect, in our considered view, the appellant's submission is misconceived. Firstly, cl 6 of the sale and purchase agreement dated 30 June

2020 reads as follows:

> 6. The said property is freehold and free from all encumbrances. However *approximately an estimated area of 36 acres of the said Property is presently leased to Majlis Perbandaran Klang as a dump site for refuse and rubbish and the said lease expires on 22nd April 2002.*

[27] SPI, Dato' Ng Bee Chai in cross-examination confirmed that: (a) based on cl 6 of the sale and purchase agreement dated 30 June 2020, the appellant has knowledge regarding the usage of the land by the respondent as a dumpsite; (b) the land was used as a dumpsite before the appellant purchased the land; and (c) he 'supposed' that permission to use the land for dumpsite was obtained from Golden Hope but he did not have the evidence.

[28] We find, based on cl 6 of the sale and purchase agreement dated 30 June 2020 and supported by the evidence of SP1 referred in para 27 above, it was proved that the usage as a dumpsite by the respondent of the land owned by Golden Hope (prior to the sale) was with the knowledge of the appellant and with the consent of Golden Hope.

[29] Secondly, the appellant's submission that the portion of the said land that was leased to the respondent to be used as a dumpsite was only 36 acres was not contradicted by the appellant is flawed as there is evidence shown to the contrary. Clause 6 of the sale and purchase agreement dated 30 June 2020 in crystal clear terms states '... However approximately an estimated area of 36 acres of the said Property is presently leased to Majlis Perbandaran Klang as a dump site ...'.

We agreed with the respondent's submission that the usage of the words, 'approximately an estimated area' in cl 6, rendered that the acreage of 36 acres of the land used by the respondent as a dumpsite is purely an estimate 'di mana terdapat kemungkinan bahawa keluasan yang digunakan oleh Responden boleh menjadi lebih atau kurang daripada 36 ekar'.

[30] We find there is evidence to show that the fact of the area of 36 acres mentioned in cl 6 is an estimate was confirmed by SP1 in cross-examination.

[31] It is not disputed that the purchase of the said land by the appellant from Golden Hope is on *as is where is basis*. However SP1 in cross-examination admitted that the appellant became aware of the extra usage of 3.479 acres after the land survey was conducted; that the respondent had been using the extra 3.479 acres much earlier before the appellant became aware of the same; and agreed when it was put to him that the extra usage of the land was before the appellant entered the sale and purchase agreement dated 30 June 2020.

[32] Further there is documentary evidence to show that the land survey conducted by the appellant was conducted in 2002, (two years after the sale) another land survey in 2018 (after the action was filed).

[33] SP4 confirmed in cross-examination that the land surveys were conducted in 2002 and in 2018 and the 2002 survey conducted by him was the first survey. To the following put question in cross-examination, SP4 replied:

> MF: So Mr Vickneshwaran, *since there was no land survey conducted before June year 2000, I put to you that there are possibilities of the total area of 39.478 acres in year 2002 are similar to the area of rubbish in June 2000 or before June in year 2000.*
>
> VICK: I can't be sure of that.
>
> MF: Yes, but there are possibilities of being the same. VICK:
>
> *OK. There are possibilities correct.* (Emphasis added.)

[34] Based on the evidence of SP4 and the survey reports of 2002 and 2018, we find it was correctly submitted by the respondent that the appellant had failed to prove that trespass (usage in excess of 3.479 acres) only occurred when the appellant became the owner of the said land.

[35] The onus is on the appellant to prove its claim in trespass which in our view the appellant failed to discharge (*Selvaduray v Chinniah* [1939] 1 MLJ 253; [1939] 1 LNS 107, SC). For the reasons explained above, we held the view that the learned judge was correct in her finding that the appellant's claim for trespass must fail.

[36] The appellant's claim in nuisance hinges on proof of trespass being established as referred in para 6(c) above. Since we have found that the appellant's claim for trespass has not been established, the appellant's claim in nuisance must necessarily fall. Therefore, in our considered view nothing turns on the fact that the learned judge made no findings on the cause of action for nuisance as submitted by the respondent.

CONCLUSION

[37] For the reasons adumbrated above, we are of the considered view that there are merits in the appeal which warranted appellate intervention. In the premises we unanimously made the following order:

(a) allowed the appeal in part in respect of the High Court decision in dismissing the appellant's claim on limitation. Accordingly we set aside the order of the High Court dated 8 August 2019 and remitted the case to the High Court for assessment of general damages for breach of contract;

(b) dismissed the appeal in respect of the claim for trespass and nuisance; and

(c) awarded costs of RM50,000 here and below to the appellant subject to allocatur.

Order accordingly.

Reported by Mohd Kamarul Anwar